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IN THE COURT OF APPEALS OF INDIANA

NEFTALIE ALVA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 75A04-0705-CR-246
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0605-FB-16

March 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Neftalie Alva appeals his conviction for arson as a class B felony.[1] Alva raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to support his conviction for arson as a class B felony; and

II. Whether Alva's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.[2]

The relevant facts follow. On April 4, 2006, Shane Sallee was living with his fiancée and daughter at the Wayne Apartments in Starke County. At 3:00 a.m., Sallee

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[1] Ind. Code § 35-43-1-1 (2004).

[2] Alva included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 39-48. We remind Alva that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

heard a beeping noise and stepped into the hallway to investigate. Sallee walked down the hallway and knocked on Alva's door because the noise was coming from Alva's apartment. The smoke alarm and a radio were turned off within a couple of seconds of each other. Sallee went back to his apartment and assumed that Alva was awake and aware of the problem.

Ten minutes later, Sallee noticed the smell of smoke getting stronger and smoke seeping into his apartment from his bathroom, which is against the same wall as Alva's apartment, and the front door. Sallee opened his window to let some of the smoke out.

Sallee heard a knock on his door, opened it, and saw Alva standing in the doorway. Alva was slurring his speech, having difficulty walking, and said a couple of words, which were "kind of incoherent." Transcript at 69. Alva said "something like that it's going down . . . it was going on or it's on." Id. at 70. Alva sat down in the middle of the hallway. Alva's apartment was engulfed in flames. Sallee ran back into his apartment, woke up his fiancée and daughter, and noticed flames and smoke coming out of the bathroom vent. Sallee called 911 and began waking up other residents.

Kim Cronkite Patrick also lived at the Wayne Apartments. Kim saw flames coming from Alva's apartment and screamed, "My God, Neff, what have you done?" Id. at 86. Kim smelled liquor on Alva and thought he was intoxicated. Kim grabbed Alva and tried to get Alva out of the building, but he did not want to leave. Kim and her husband helped a neighbor get out through a window.

Later, Alva approached some residents near the entryway of the building and asked if anybody had a match. Id. at 114. When no one responded, Alva said, "I hope you all burn up," and walked away. Id.

The Chief of the Hamlet Fire Department, Grover Goetz, arrived at the scene and went into the building. Alva tapped Chief Goetz on the shoulder. Alva did not respond when Chief Goetz asked Alva what he was doing. Chief Goetz threw Alva out of the building and told him not to come back into the building.

Fire trucks arrived, and Firefighter John Goble went inside the building to perform a search. Goble did not make it all the way to the end of the hallway because he discovered Alva sitting down in front of his apartment. Goble told Alva that he needed to get him out of the building, and Alva said that he was not going anywhere. Alva also said, "Just let it burn. You firemen need to get the fuck out of here," and "You firemen are going to die." Id. at 182. Goble tried to pull Alva up, but Alva pulled away. Goble left the building and returned with another firefighter. Goble and the other firefighter brought Alva out forcefully and gave Alva to Chief Goetz.

Chief Goetz told Alva, "Don't move. Don't go nowhere." Id. at 153. Alva was mumbling and kept trying to go back in the building. Chief Goetz thought that Alva appeared to be "either drunk or . . . on something." Id. at 156. Chief Goetz called the police and told the responding officer, Starke County Police Officer Brett Hansen, that Alva was "being totally a fool trying to go back in the building" and "[h]e was stopping us from performing what we were supposed to do . . . ." Id. Officer Hansen placed Alva

in a squad car and arrested Alva for public intoxication and interfering with a firefighter. Officer Hansen administered a breathalyzer test to Alva, and Alva tested ".19." Id. at 172.

Frederick Sumpter, the Assistant Chief of Investigations for the Department of Homeland Security, investigated the fire. Sumpter found three separate areas of origin for the fire in Alva's apartment. The areas of origin included: (1) Alva's doorway; (2) the area between the base cabinets and refrigerator; and (3) a corner of the living room. Sumpter discovered combustible materials such as "plastic buckets, stacks of paper, books and magazines" in the areas of origin. Id. at 278. Sumpter did not find evidence that gasoline had been used in the fire. Sumpter eliminated all natural and accidental ignition sources and concluded that the three separate fires were set intentionally.

The State charged Alva with arson as a class B felony. After a jury trial, Alva was convicted as charged. The trial court found the following aggravators: (1) the harm, injury, loss or damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense; (2) Alva's criminal history; (3) Alva had recently violated a condition of probation; and (4) Alva interfered with the fire department personnel. The trial court sentenced Alva to twenty years in the Department of Correction and suspended five years.

I.

The first issue is whether the evidence is sufficient to sustain Alva's conviction for arson as a class B felony. Arson is almost always subject to proof solely by

circumstantial evidence. Barton v. State, 490 N.E.2d 317, 318 (Ind. 1986), reh'g denied. In reviewing the sufficiency of circumstantial evidence leading to a conviction, we use the same scope of review as when the evidence is direct. Galbraith v. State, 468 N.E.2d 575, 577 (Ind. Ct. App. 1984), trans. denied. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of arson is governed by Ind. Code § 35-43-1-1, which provides that "[a] person who, by means of fire, explosive, or destructive device, knowingly or intentionally damages . . . property of any person under circumstances that endanger human life . . . commits arson, a Class B felony." Thus, to convict Alva of arson as a class B felony, the State needed to prove that: (1) Alva, by means of fire; (2) knowingly damaged the Wayne Apartments building; (3) under circumstances that endanger human life.

Alva argues that there is insufficient evidence to sustain his conviction because: (1) his intoxication easily explains his comments and conduct; (2) no accelerant was discovered; and (3) he had no motive. Alva cites McGowan v. State, 671 N.E.2d 1210, 1214 (Ind. Ct. App. 1996), in which this court held that "standing alone, evidence of

motive, presence, or opportunity is insufficient to prove guilt." Alva argues that "[i]n this case, all we have is presence and opportunity." Appellant's Brief at 5.

Initially, we note that motive is not an essential element of arson, but may contribute to a finding that one committed arson. Talley v. State, 400 N.E.2d 1167, 1171 (Ind. Ct. App. 1980). Alva merely asks that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Jordan, 656 N.E.2d at 817. The evidence most favorable to the verdict reveals that when Sallee knocked on Alva's door, Alva's smoke alarm and radio were turned off within a couple of seconds of each other. Alva knocked on Sallee's door and said "something like that it's going down . . . it was going on or it's on." Transcript at 70. Alva approached some residents near the entryway of the building and asked if anybody had a match, and when no one responded, he said, "I hope you all burn up," and walked away. Id. at 114. After Chief Goetz told Alva to stay out of the building, Alva went back inside. When firefighters discovered Alva inside the burning building, Alva told them he was not going anywhere and, "Just let it burn. You firemen need to get the fuck out of here," and "You firemen are going to die." Id. at 182. The firefighters brought Alva out forcefully and gave Alva to Chief Goetz.

Sumpter investigated the fire and found three separate areas of origin for the fire in Alva's apartment. The areas of origin included: (1) Alva's doorway; (2) the area between the base cabinets and refrigerator; and (3) a corner of the living room. Sumpter did not find evidence that gasoline had been used in the fire. Sumpter eliminated all natural and

accidental ignition sources and concluded that the three separate fires were set intentionally. Sumpter discovered combustible materials such as "plastic buckets, stacks of paper, books and magazines" in the areas of origin. Id. at 278. Evidence of probative value exists from which the jury could have found Alva guilty of arson as a class B felony. See, e.g., Bald v. State, 766 N.E.2d 1170, 1174 (Ind. 2002) (holding that "the circumstantial facts taken together were sufficient to support [the defendant]'s conviction as the arsonist").

II.

The next issue is whether Alva's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Alva argues that the maximum sentence is inappropriate here.

Our review of the nature of the offense reveals that Alva started three separate fires in his apartment and turned off his smoke detector. Alva told residents, "I hope you all burn up." Transcript at 114. Alva disobeyed Chief Goetz's orders to stay out of the burning building and interfered with the firefighters. Chief Goetz testified that if any tenants had remained in the building they would have died.

Our review of the character of the offender reveals that Alva has convictions for resisting law enforcement as a class A misdemeanor, disorderly conduct as a class B misdemeanor, refusal to leave emergency incident area as a class A misdemeanor, five counts of driving while intoxicated, two counts of public intoxication as class B misdemeanors, and two counts of battery as class B misdemeanors.[3] Alva was on probation when he committed the current offense.

After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Fultz v. State, 849 N.E.2d 616, 625 (Ind. Ct. App. 2006) (holding that defendant's maximum sentences for murder and arson were not inappropriate where the defendant had amassed an extensive criminal history and was on probation when he committed the offense), trans. denied.

For the foregoing reasons, we affirm Alva's sentence for arson as a class B felony.

Affirmed.

BARNES, J. and VAIDIK, J. concur

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[3] Alva argues that he "had no prior convictions for any crime of violence (the two Class B misdemeanor Battery charges of January 11, 2005, do not show a disposition.)" Appellant's Brief at 7 (citing Appellant's Appendix at 43). The presentence investigation report reveals that Alva was charged with two counts of battery as class B misdemeanors under Cause Number 75H01-0501-CM-00118 ("Cause No. 118") on January 11, 2005. The entry for Cause No. 118 states: "Disposition: See dispo [sic] in 75H01-0501-CM-101," ("Cause No. 101"). Appellant's Appendix at 43. The disposition under Cause No. 101, which involved a public intoxication as a class B misdemeanor charge on January 12, 2005, states: "Plea agreement where [Alva] pleads guilty to both counts of Battery in [Cause No. 118] with the state agreeing to dismiss [Cause No. 101]." Id. Thus, the presentence investigation report indicates that Alva has convictions for two counts of battery as class B misdemeanors.